SINGAPORE REPORTS

Algemene Bank Nederland NV v Happy Valley Restaurant Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NOS 1033 OF 1983 AND 5224 OF 1984
CHAO HICK TIN J
10 APRIL 1991

Banking — Cheques — Crossed 'account payee only' and 'not negotiable' — Whether such cheques are not transferable — Presumption of consideration from person suing on bills and notes until contrary is shown — Bills of Exchange Act (Cap 23, 1985 Ed), ss 8(1), (2), (4), 30 & 81

Civil Procedure — Defence — Application to amend — Whether proposed amendments were of a material nature and would unfairly prejudice the plaintiffs

Maris Enterprises (Pte) Ltd ('Maris') applied to the plaintiffs for the issue of a letter of credit in favour of Stemark Industries Ltd of Hong Kong ('Stemark') for the purchase of sharksfin and abalones pursuant to which a letter of credit was duly issued by the plaintiffs in favour of Stemark. An arrangement was made between Maris and the plaintiffs with a view to Maris obtaining the release of the goods from the plaintiffs whereby the defendants would issue post-dated cheques, one for $50,000 in favour of Maris and the balance three each of equal amounts of $213,900 in favour of the plaintiffs.

Accordingly, four post-dated cheques were issued by the defendants. However, the last three cheques, instead of being made payable to the plaintiffs, as arranged, were made payable to Maris. All four cheques were, on the same day, indorsed and forwarded by Maris to the plaintiffs with a request that the plaintiffs deliver the title documents relating to the goods directly to the defendants. The plaintiffs accepted this slight deviation from the original arrangement and accepted the cheques. The goods were then delivered to the defendants. Subsequently, all the four cheques were dishonoured when they were presented for payment.

The two actions were instituted by the plaintiffs to recover the four sums under the four cheques as indorsee of the four cheques. In defence, the defendants claimed that:

(i) as the cheques were crossed 'account payee only' and 'not negotiable' the plaintiffs could not claim as indorsee on the ground that there was a total failure of consideration in so far as Maris could not give the plaintiffs better title to the cheques than that which Maris had and Maris had no title thereto since the goods delivered were not of the quality which the defendants had contracted to buy and the quantity tendered was less than the agreed quantity; and

(ii) notwithstanding their letter to Maris that they had rejected the goods and would stop payment on the four cheques, Maris fraudulently indorsed the four cheques over to the plaintiffs thereafter.

The defendants had also applied to amend their defence to introduce three additional defences (one of which was that Maris was prohibited from transferring the cheques to the plaintiffs).

Held, allowing the plaintiffs' claim:

(1) The plaintiffs are clearly holders for value of the four cheques and it could not have been argued by the defendants that the four cheques were not transferable as the crossing of a cheque with the words 'account payee only' does not, in law, prevent transferability of a cheque and is merely a directive to the collecting bank. The crossing of a cheque with the words 'not negotiable' also would not preclude such a crossed cheque from being transferred. All that it means is that the subsequent indorsee of the cheque 'shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had'. The combined effect of the two sets of words 'account payee only' and 'not negotiable' does not render a cheque any less transferable (as separately they do not) and something more must be indicated on the cheque to show that there is an intention that the cheque should not be transferable. No such indication appeared on the four cheques indorsed to the plaintiffs.

(2) Unlike in the case of a simple contract where the person who sues on it must plead and prove consideration, bills and notes are an exception and consideration is presumed till the contrary is shown. Accordingly, the burden of showing, in respect of the four cheques, that there was a total failure of consideration rested with the defendants.

(3) There was no total failure of consideration in this case as the goods inspected by the defendants about which the defendants had complained were not the goods in question delivered by the plaintiffs but were goods related to some other orders. In any case, the alleged contract between Maris and the defendants to supply and purchase the goods was not a bona fide one as Maris did not trade in sharksfin and abalones and had imported the goods specially for the use of the defendants and the documents forwarded to Maris from the defendants were created specifically for the transaction and indicated nothing as to the quality nor unit price of the goods. Moreover, when the defendants informed Maris that they were rejecting the goods they did not even notify the plaintiffs of the same. Further, at all material times, the principal shareholder of the defendants, Maris and Stemark, was the same person and so was the person who managed the defendants and Maris. In view of the above, the entire transaction was concocted and the entire defence based on failure of consideration was a sham.

(4) The defendants' application to amend the defence was only made after the plaintiffs had closed their case and the defendants had begun to call their first witness and while the parties were waiting for dates to be allocated for the resumed hearing of the actions. The proposed amendments were of a material nature and would unfairly prejudice the plaintiffs. Moreover, the plaintiffs had already closed their case and an award of costs alone would not undo the harm which the amendments would cause. In any case, the points sought by the defendants to be included in their defence could and should have been raised by the defendants very much earlier. In view of the above, it would not be proper and just to allow the defendants' application to amend their defence.

Cases referred to

1 *Universal Guarantee Pty Ltd* v *National Bank of Australasia Ltd* [1965] 2 All ER 98 (folld)
2 *Importers Co Ltd* v *Westminster Bank Ltd* [1927] 2 KB 297 (folld)
3 *Dungarvin Trust (Pty) Ltd* v *Import Refrigeration Co (Pty) Ltd* [1971] (4) SA 300 (not folld)
4 *Standard Bank of SA Ltd* v *Sham Magazine Centre* [1977] (1) SA 484 (folld)
5 *Hibernian Bank* v *Gysin & Hanson* [1939] 1 All ER 166 (folld)

Legislation referred to
Bills of Exchange Act (Cap 23, 1985 Ed), ss 8(1), (2), (4), 30, 81

Steven Chong for the plaintiffs.
Tang Liang Hong (*Siaw Kheng Boon* with him) for the defendants.

Cur Adv Vult

Chao Hick Tin J: The plaintiffs are a Dutch bank carrying on business in Singapore. On 16 July 1982 a company, Maris Enterprises (Pte) Ltd (hereinafter called 'Maris'), applied to the plaintiffs for the issue of a letter of credit in favour of Stemark Industries Ltd of Hong Kong (hereinafter called 'Stemark') for a sum of HK$600,000 (equivalent to S$213,900) for the purchase of 300 katies of sharksfin and 100 katies of abalones. The quantity of the sharksfin was subsequently amended to be only 100 katies. Pursuant thereto, a letter of credit was duly issued by the plaintiffs in favour of Stemark.

The goods in question were conveyed by Cathay Pacific Airways from Hong Kong to Singapore on or about 21 August 1982. The air waybill listed the plaintiffs as the consignees. It also stated that Maris should be notified when the goods arrived. Normally the plaintiffs would allow Maris to take the goods against a trust receipt. In this instance the plaintiffs refused because Maris had an overdue trust receipt in respect of an earlier transaction (involving diamonds) amounting to S$295,000. In view of this the plaintiffs instructed KC Dat, a reputable firm of removers, to take delivery of the goods and to store them in an airconditioned premises. Various proposals were made by Maris to take delivery of the goods but those proposals were not acceptable to the plaintiffs. One David Yong was the person who was managing the affairs of Maris and talking to the plaintiffs' officers.

Then on or about 2 December 1982 David Yong, acting for Maris, had a discussion with officers of the plaintiffs with a view to obtaining the release of the goods. This led to a certain arrangement which was set out in a letter of 2 December 1982 (AB54) from Maris. This arrangement involved the payment of $100,000 for the outstanding trust receipt of Maris and a scheme of payment for $213,900 in respect of the sharksfin and abalones (hereinafter called 'the goods'). In the letter of 2 December 1982 a first cheque for $50,000 was enclosed. The cheque was honoured. On 22 December 1982, Maris wrote again to the plaintiffs informing them that the ultimate buyer of the goods, ie Happy Valley Restaurant (Pte) Ltd, the defendants (hereinafter referred to as 'Happy Valley'), were not agreeable to the terms earlier agreed. Instead the following was proposed: on delivery of the goods to the defendants the following cheques would be issued:

(i) a cheque for $50,000, post-dated to 15 days after delivery and made payable to Maris;
(ii) three cheques of equal amounts totalling $213,900, the first of which was to be post-dated 30 days after delivery and the subsequent cheques to be post-dated at 30-day intervals and the cheques were to be made payable to the plaintiffs.

Both the letters of 2 December 1982 and 22 December 1982 were copied by Maris to Happy Valley.

Accordingly, on 11 January 1983 four cheques were issued by Happy Valley for the sums of $50,000, $71,300, $71,300 and $71,300 and post-dated 31 January 1983, 28 February 1983, 31 March 1983 and 30 April 1983 respectively. However, the last three cheques, instead of being made payable to the plaintiffs, as agreed, were made payable to Maris. These cheques were, on the same day, indorsed and forwarded by Maris to the plaintiffs with a request that the plaintiffs deliver the title documents relating to the goods directly to Happy Valley. Notwithstanding that there was a slight deviation from the original agreement, as the three later cheques should have been made payable to the plaintiffs, the latter decided to accept them on their being indorsed over by Maris. As instructed by the plaintiffs, the goods were delivered by KC Dat to Happy Valley on or about 13 January 1983. Subsequently, all the four cheques were dishonoured on the due dates when they were presented for payment. The present two actions have been instituted by the plaintiffs to recover the four sums under the four cheques. The two actions have been consolidated by an order of court dated 11 February 1985.

The claim of the plaintiffs is as an indorsee of the four cheques. At all relevant times, the principal shareholder of Happy Valley, Maris and Stemark was one Nicholas Chu, except that in December 1982/January 1983, Nicholas Chu's shares in Happy Valley were bought over by his half brother, Aloysius Chu.

In their defence, Happy Valley state that as the cheques were crossed 'account payee only' and 'not negotiable', they deny that the plaintiffs, as indorsees, are entitled to payment on the said cheques on the ground that there was a total failure of consideration. Happy Valley say that what they had agreed to purchase from Maris were 100 katies of *superior* sharksfins and 100 katies of *superior* abalones. In forwarding the four cheques in question to Maris on 11 January 1983, Happy Valley had, in their letter of that date, expressly stated that 'we reserve the right to reject any part of the shipment should they not be of the quality as sample shown and quantity as specified'. Happy Valley claim that when the goods were delivered they were found not to be of the quality which Happy Valley had contracted to buy. Happy Valley have also pleaded that the quantity

tendered was less than that agreed to (this plea has been withdrawn). By a letter dated 15 January 1983 Happy Valley informed Maris that they had rejected the goods and would stop payment on the four cheques. They further aver in their defence that in spite of the notice of rejection given on 15 January 1983, Maris fraudulently indorsed the four cheques over to the plaintiff on 31 January 1983, 28 February 1983, 31 March 1983, 30 April 1983 respectively. Happy Valley say that in view of the breach of a fundamental term of the contract of sale and purchase, Maris was not entitled to any payment whatsoever and therefore by virtue of s 81 of the Bills of Exchange Act, Maris was not capable of giving a better title to the said cheques than that which Maris itself had.

Application to amend defence

It would be appropriate for me at this juncture to refer to an application made by Happy Valley to amend their defence in order to introduce the following three additional defences:

(i) that Maris was, at all material times, prohibited from and was not capable of transferring the cheques to the plaintiffs;
(ii) that the sharksfin and abalones delivered were infested with worms;
(iii) that the rejection conveyed in the letter of Happy Valley of 15 January 1983 was accepted orally by Maris, through its manager, David Yong, sometime in January 1983.

Now this application to amend the defence was only made after the plaintiffs had closed their case and the defendants had begun to call their first witness and while the parties were waiting for dates to be allocated for the resumed hearing the actions. As these proposed amendments were of a material nature and as they would unfairly prejudice the plaintiffs, particularly in relation to the second and the third amendments, and as the plaintiffs had already closed their case, I did not think it was proper and just that I should allow the application. It seemed to me clear that the evidence the plaintiffs would adduced would depend on what allegations they had to meet. An award of costs alone would not undo the harm which the amendments would cause. And of course these were points which the defendants could and should have raised very much earlier. I may add that even when the defence counsel opened his case, he did not say that the cheques were not transferable, only that they were not negotiable and that the plaintiffs had accepted them at their own peril.

Effect of crossing on cheques

On the evidence it is clear that the plaintiffs are holders for value of the four cheques. Through David Yong and through the letters of 2 December and 22 December 1989 from Maris to the plaintiffs and which were copied to Happy Valley, Happy Valley knew very well that of the four cheques issued, the first for $50,000 was to settle a part of the outstanding trust receipt of Maris and the remaining three cheques were to pay for the goods in question amounting to $213,900. On the basis of the pleadings before me, it is clear that it is not open to the defendants to argue that the four cheques were not transferable. The defence filed impliedly admit that the cheques could be transferred but only that in view of a total failure of consideration, the plaintiffs, as indorsees, could have no better title to the four cheques than Maris itself.

Though I have disallowed the amendment proposed by the defendants to add the additional defence on non-transferability of the cheques, counsel for both parties have made submissions on this very point. Therefore, I propose to deal with it.

The relevant provisions of the Bills of Exchange Act (Cap 23, 1985 Ed) ('the Act') are s 8(1), (2) and (4) and s 81, which read as follows:

> 8(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.
> (2) A negotiable bill may be payable either to order or to bearer.
> (4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.
>
> 81 Where a person takes a crossed cheque which bears on it the words 'not negotiable', he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

The effect of s 8(1) and (4) of the Act is that for a cheque to be non-transferable it must contain words on the cheque itself 'prohibiting transfer or indicating an intention that it should not be transferable'. Other than the fact that the four cheques were crossed with the words 'non negotiable account payee only' there were no other words on the cheques prohibiting transfer.

The crossing with the words 'account payee only' does not, in law, prevent transferability of a cheque. It is merely a directive to the collecting banker. This is clearly established in the case *Universal Guarantee Pty Ltd* v *National Bank of Australasia*[1] at p 102 where the Privy Council stated the following:

> The addition of the words 'a/c payee' or 'a/c payee only' refer to the payee named in the cheque and not the holder at the time of presentation (*House Property Co of London* v *London County & Westminster Bank* (1915) 84 LJKB 1846), but they do not prevent, at law, the further negotiability of

the cheque. The words merely operate as a warning to the collecting bank that if it pays the proceeds of the cheque to some other account it is put on inquiry and it may be in a difficulty in relying on any defence under s 88 of the Act in an action against it for conversion of the cheque; per Scrutton LJ in *AL Underwood, Ltd* v *Bank of Liverpool and Martins, Same* v *Barclays Bank* [1924] 1 KB 775. These words do not cast on the paying bank, paying the cheque to a banker, any additional obligation to satisfy itself that the collecting bank is collecting it on behalf of the named payee. That is entirely the responsibility of the collecting bank.

In *Importers Co Ltd* v *Westminster Bank Ltd*[2] Atkin LJ said the following at p 307:

What is the meaning of a cheque marked, 'Account payee only'? I do not know any better statement of it than that made by Bigham J, a very great authority on questions of commercial, and particularly of banking practice, in *Akrokerri (Atlantic) Mines* v *Economic Bank* [1904] 2 KB 465 that 'the paying bank has nothing to do with the application of the money after it has once been paid to the proper receiving banker. The words 'account AB' are a mere direction to the receiving bank as to how the money is to be dealt with after receipt.'

As regards the crossing with the words 'not negotiable', the authorities are also clear that it does not preclude such a crossed cheque from being transferred. This is, in fact, implicit from s 81 of the Act which I have quoted above. All that it means is that the subsequent indorsee of the cheque 'shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had'. See *Universal Guarantee Pty Ltd*[1] at p 103. The effect of such a crossing is succinctly explained in *Paget's Law of Banking* (14th Ed) at p 374 and I do not think I could do any better than to quote from it:

The effect of the crossing is that the cheque remains transferable, but is deprived of the full character of negotiability. However honestly and for value a transferee may take it, he cannot acquire any better title to the cheque or its proceeds, or any better right against any prior party to it, than his transferor had. So long, however, as there is no defect of title, or failure of consideration, the cheque may pass from hand to hand just as if it was an open cheque or a simply crossed cheque, and each successive holder acquires full rights and title thereon.

Now the next question is whether the fact that these four cheques have both these two sets of words render them any less transferable. In the South African case of *Dungarvin Trust (Pty) Ltd* v *Import Refrigeration Co (Pty) Ltd*[3] where the facts were very similar to ours — the cheque was crossed 'not negotiable — A/C payee only' and the words 'or bearer' on the cheque behind the name of the payee were struck out — Snyman J held that such a crossing especially the words 'a/c payee only' indicated an intention that the cheque should not be transferable. He explained at p 306:

So what the drawer has said is that it issues the cheque subject to equities and requires that it shall be paid into the banking account of the payee only. These words are of course not a direct instruction prohibiting transfer but fall into the meaning of the second part of the section — that is that they are words indicating an intention that the cheque should not be transferable. There seems to me to be no ambiguity in this or any suggestion of non-transferability. In my view the crossing and the words convey a clear and definite prohibition against transfer. It would of course have been better style and more in accordance with the wording of the section if the drawer had used the words 'not transferable' . . .

However *Dungarvin*[3] was expressly disapproved of by the South African Court of Appeal in *Standard Bank of SA Ltd* v *Sham Magazine Centre*[4] which held that a cheque which was crossed with the words 'non-negotiable' and 'A/C payable only' was transferable. Holmes JA clearly did not agree with Snyman J when he said the following in relation to the words 'a/c payee only' (at p 504):

These words have no effect on the transferability of the cheque. They may operate as some safeguard if the cheque should fall into wrong hands. They are, in effect, a direction to the collecting banker that the specified payee should receive the money. These words cease to have any operation if the payee specified in the cheque transfer it (eg by special endorsement) because thereupon the specified payee parts with his right to receive the money.

In my view the court in *Dungarvin*[3] fell out of line with other authorities when it held that the word 'account payee only' indicated an intention that the cheque should not be transferable. I do not think the combined effect of the two sets of words 'account payee only' and 'not negotiable' renders a cheque any less transferable, as separately they do not. Something more must be indicated on the cheque to show that there is an intention that the cheque should not be transferable. In my judgment although the four cheques in question were crossed with the words 'Non Negotiable A/C Payee only' and the words 'or bearer' had been struck out, they remain transferable and the plaintiffs take them subject only to equities, as provided in s 81.

The case cited by the defence counsel, *Hibernian Bank* v *Gysin & Hanson*,[5] is irrelevant as it had nothing to do with a cheque.

Total failure of consideration

I now turn to deal with the question of a total failure of consideration. In the case of a simple contract, the person who sues on it must plead and prove consideration. But it is clear that to this rule, bills and notes are an exception and consideration is presumed till the contrary is shown: see s 30 of the Act and *Phipson on Evidence* (14th Ed) at p 67. Accordingly, the burden of showing, in respect of the four cheques, that there was a total failure of consideration rests with the defendants.

From the evidence Happy Valley's case is as follows. Sometime in January 1983 Happy Valley agreed

to buy 100 katies of superior sharksfin and 100 katies of superior abalones from Maris. This transaction was eventually evidenced by the debit note dated 11 January 1983 issued by Maris to Happy Valley. This was followed by a letter of even date from Happy Valley to Maris forwarding the four post-dated cheques and receiving the rights to reject if the goods were not of the agreed quality. And as the goods eventually delivered were not of that quality, Happy Valley gave notice to reject and stopped payment on the four cheques.

In support of their case Happy Valley called as their first witness the chief cook at the relevant time, one Tsuang Kang Hung (DW1). The cook's evidence is that he was shown samples of the sharksfin and abalones which Happy Valley were about to order. The sharksfin was of a superior type known as ..... and the abalones were 10-headed. However, the sharksfin which were delivered were not ..... but ..... Further, the abalones were 20-headed, an inferior grade, instead of 10-headed. He also said that there were worms in the sharksfin and holes in the abalones. The cook further said that the goods came in 30-40 cartons, like those used to pack sunkist oranges. He discovered on inspection that the goods were dry and could not have been stored in an air-conditioned room. As the goods had to be rejected he told one Lareen Kan (DW3) to return the goods to Maris. In the meantime the goods were stored in the store-room on the fifth floor of the Singapore Shopping Centre. Because of their bad condition, security officers of the building had complained that the goods gave off an unpleasant odour and neighbouring shops had also complained that they had seen worms creeping into their premises. Because of such complaints he used plastic bags to bundle up the goods. These rejected goods were not taken away until November 1983.

Lareen Kan (DW3) told the court that she did not see the goods when they were delivered. What she told the court was what she heard from the cook. However, it is hard to believe when she said that she was not aware that the plaintiffs had an interest in the goods. Though she did not give an exact description of her job in Happy Valley, she seems to me to be some kind of an office assistant. In the returns submitted to the Registry of Companies she was described as secretary. It is also hard to believe when she said that only the cook and her would order sharksfin for Happy Valley. She seemed to suggest that David Yong had no authority to make orders. How could that be when he was the alter ego of Happy Valley? Even she called him the manager.

The defence also called Aloysius Chu to testify. He told the court that he agreed to buy over Nicholas Chu's shares in Happy Valley from a pledgee in early December. The transaction was completed towards the end of January 1983. He said that from December 1982 he took over the management of Happy Valley and was made a director on 6 December 1982. He retained the entire staff at the restaurant, including Lareen Kan, and also put in another person, Susanna Kwan. During the first few months he had also obtained the assistance of David Yong. This is the evidence of Aloysius Chu as to how he agreed to purchase the goods:

> I first heard of the buying of abalone and sharksfin from Maris from David Yong who rang me at Hong Kong. I told David Yong that if the goods were suitable we could take them up. I asked him to check with Lareen and the chief cook. Later, Lareen called me and told me that the chief cook (DW1) was shown the samples given by David Yong and DW1 confirmed that the goods could be used by restaurant. DW1 also confirmed that the price was about right. That was how we came to buy the sharksfin and abalones. I thought it was a Maris and Happy Valley transaction. When Lareen was asked to issue the cheques I told Lareen with whom I had talked to everyday at that time, to reserve our rights to accept or reject.
>
> My understanding was that we were buying the goods from Maris. I had never talked to the bank. I only talked to David Yong, who was general manager of Maris. I knew subsequently that there were complaints that the goods were no good. Lareen called me. I asked her to tell David Yong to stop payment of the cheques.

According to the airwaybill (AB46) issued by Cathay Pacific, the goods that were consigned by Stemark were in four packages weighing a total of 132kg. Each of the packages was of the dimension 52 × 41 × 41cm (approximately 20½" × 16" × 16"), about the size of the carton used to pack sunkist oranges. Yet on the cook's evidence he said the goods arrived in 30 to 40 cartons each marked on the outside 5 katies or 10 katies of sharksfin. Those were certainly not the goods consigned by Stemark. Those were not the goods which the plaintiffs asked KC Dat to deliver to the defendants. In this regard it is important that I set out the instructions sent by the plaintiffs to KC Dat on 12 January 1983 on the delivery of the goods to Happy Valley.

> Re: Your Godown Warrant No 5747 dated 21 September 1982 covering 4 cartons sharksfin and abalone (stored INO ABN Bank) for account of Maris Enterprises Pte Ltd Our Ref IO 59313
>
> We refer to the abovementioned goods and enclosed herewith the godown No 5747 duly endorsed by us and hereby authorize you to release the four cartons of sharksfin and abalone to M/S Happy Valley Restaurant Pte Ltd, free of payment.
>
> After delivery has been effected, kindly send us a copy of your delivery order and statement of charges, if any.
>
> Thanking you . . .
>
> cc Happy Valley Restaurant Pte Ltd
> 01-01/10 Singapore Shopping Centre
> Orchard Road
> Singapore 0923

It is not denied that Happy Valley received this letter even though the address stated was not entirely correct

as the Singapore Shopping Centre is not located along Orchard Road but on a road next to Orchard Road. Happy Valley have not objected to the admission of this letter.

By this letter Happy Valley would have known quite clearly that only four cartons were to be delivered. Happy Valley never informed the plaintiffs and/or Maris that something different was delivered. So the irresistible inference must be that what the cook saw, consisting of 30-40 sunkist orange cartons, could not be what was delivered by KC Dat on the instructions of the plaintiffs. What the cook inspected were not the goods in question but were goods related to some other orders.

This ruling should suffice to dispose of the defence. But I will nevertheless go on to deal with the next question: was the alleged contract between Maris and Happy Valley to supply and purchase the superior sharksfin and abalones on 11 January 1983 a bona fide one. It is not in dispute that Happy Valley were then operating a high class Chinese restaurant of the same name. Maris itself was not involved in the restaurant business. The following questions and answers in the evidence of Aloysius Chu (DW2) at NE30-31 and at NE35 are pertinent:

Q: Was it possible that prior to your involvement in the defendant, there could be an understanding between Maris and the defendant?
A: Possible. It was all one person — the same person controlling both companies.
Q: The shipment arrived in September 1982?
A: I do not know.
Q: Assuming that was so, then you had no interest in the defendant:
A: That was so.
Q: In September 1982 because two companies were controlled by one person, there would be some arrangements?
A: I do not know.
Q: Put — that when the goods were imported into Singapore by Maris, it was always intended to be used by Happy Valley?
A: I was told that by David Yong.
Q: Put — in the light of the close proximity between the two companies, there would have been some understanding or arrangement that the defendants would use the goods?
A: I do not know.
. . .
Q: Because Maris and Happy Valley were controlled by the same person, Nicholas Chu, Maris did bring in stocks for Happy Valley?
A: Yes.
Q: Maris would know what types of stock Happy Valley required?
A: Yes.

Even in the letter dated 22 December 1982 (AB55) from Maris to the plaintiffs it was stated that the ultimate buyers of the consignment were Happy Valley.

I find on the evidence that Maris had from the very beginning imported the goods for the use of Happy Valley. There is nothing to suggest that Maris traded in sharksfin and abalones. There must have been an understanding or agreement between Maris and Happy Valley at the time the goods were ordered from Stemark. This is all the more so when we bear in mind that in July/August 1982, David Yong was in charge of both Maris and Happy Valley. Even Aloysius Chu admitted that before his taking over Happy Valley, David Yong was the alter ego of that company. In any case David Yong told PW1 that the goods were meant for Happy Valley.

I find that the debit note dated 11 January 1983 (AB72) from Maris to Happy Valley could not be the document that created the contract between them. It is significant that nothing was indicated on the debit note as to quality; neither was the unit price stated. The price of the goods was only S$213,900; yet the debit note stated it was S$263,900. It could not be such a coincidence that this was the very sum insisted upon by the plaintiffs before they would release the goods to Maris which was made up of S$213,900 for the goods and $50,000 in part payment of the outstanding trust receipt of Maris (see AB55). No other reason was proffered why Happy Valley should pay more for the goods.

In so far as the letter of even date from Happy Valley (signed by David Yong) to Maris, where Happy Valley reserved the right to reject the goods, is concerned, I see that effectively as a letter written by David Yong to himself. I accept the plaintiffs' counsel's submission that the plaintiffs would not have released the goods if this letter was disclosed to them. I find that the withholding of this letter from the plaintiff was a deliberate move.

When the payment on the first cheque, which was due on 31 January 1983, was stopped on 1 February 1983 the plaintiffs' representative (PW1) immediately called on David Yong, who never at that interview mentioned that the quality of the goods was inferior. Instead David Yong explained that the cheque was dishonoured because Happy Valley's banking facilities had been suspended owing to the adverse publicity in the press then. This is entirely consistent with the way in which Happy Valley stopped payment on the four cheques. If it were in fact true that the cheques were stopped because the goods delivered were of poor quality, I would have expected Happy Valley to notify the bank straight away to stop payment on all the four cheques. Why did they stop payment on the four cheques by instalments, the first cheque on 31 January 1983, second cheque on 26 February 1983 and last two cheques on 28 March 1983? Lareen Kan said that it did not occur to her to stop all the cheques at once. I say it did not occur to her because she was not the person in charge; David Yong was. She just signed when asked by David Yong. She admitted (at NE46) that the first stop payment notice was not prepared by her.

Having considered all the circumstances of the case I find that the debit-note and the letter of 11 January 1983 from Happy Valley to Maris are not documents evidencing a real transaction between Maris and Happy Valley. They were created for reasons best known to David Yong. David Yong holds the answers to all the queries yet Happy Valley chose not to call him to explain the transaction and all the relevant circumstances. No explanation was given to the court why he could not be called. The evidence shows that though he was not on the payroll of Happy Valley, he was effectively managing Happy Valley on behalf of Nicholas Chu. Lareen Kan called him the manager; Aloysius Chu described him as the alter ego of Happy Valley (before Aloysius Chu became the main shareholder). I would say even after Aloysius Chu bought over the shares of Nicholas Chu, David Yong was still effectively managing Happy Valley for a period of time notwithstanding what Aloysius Chu said. The reason is simple: Aloysius Chu was then still residing in Hong Kong. As late as at the end of March 1983, David Yong was still the authorized signatory of Happy Valley. All relevant documents were also signed by him. When the plaintiffs' solicitors' letter of 4 February 1983 were received, again Aloysius Chu instructed David Yong to deal with it. I may add that even as late as 13 February 1984 the records at the Registry of Companies still showed Nicholas Chu as the main shareholder in Happy Valley.

I find that Happy Valley, through David Yong, as well as the various letters copied to them, knew that the plaintiffs had an interest in the goods. Yet when Happy Valley rejected the goods, they did not even bother to notify the plaintiffs. I think the motive is clear.

As mentioned above, I had disallowed an amendment to the defence to introduce the allegation of the existence of worms in the goods. Even if what the cook said was true, that he saw worms in the sharksfin, I am satisfied that there are sufficient reasons for me to hold that the goods which he inspected were not the goods delivered by KC Dat on the instructions of the plaintiffs; they were some other goods.

Conclusion

Let me conclude in this way. I think the entire defence based on failure of consideration is a sham. The whole thing is concocted. Maris and Happy Valley were at all relevant times, July 1982 to January 1983, effectively managed by David Yong. He was the one who, in July 1982, ordered the goods from Stemark, a company in Hong Kong owned by Nicholas Chu, the main shareholder of Happy Valley and Maris. David Yong was the one who arranged with the plaintiffs for the goods to be released. He was the one who signed the four cheques (crossed 'not negotiable, account payee only') on behalf of Happy Valley. He was the one who wrote the alleged letter of 11 January 1983 (AB71) addressed to Maris (effectively to himself) forwarding the four cheques and stating that Happy Valley reserved the right to reject the goods if they were not of the agreed quality. Why was this letter not copied to the plaintiffs? Again, why was the letter of rejection of the goods on 15 January 1983 not copied to the plaintiffs? Why was it that at the meeting which PW1 had with David Yong following the dishonour, nothing was mentioned by David Yong about inferior quality? Why was there no response to the plaintiffs' solicitors' letter of 4 February 1983 to Happy Valley complaining of the dishonour? Why is David Yong, who is such a crucial person to the transaction, not called as a witness?

The burden of showing that Happy Valley have overriding equities against the plaintiffs rests on Happy Valley. I hold that Happy Valley have not shown that there was any failure of consideration in respect of the cheques. The allegation that Happy Valley only agreed to purchase the goods from Maris on 11 January 1983, and that the contract was evidenced by the debit note and the letter of Happy Valley of that date, is not true.

I hold that the first cheque for $50,000 was not in payment of the goods but in part settlement of the earlier outstanding trust receipt of Maris.

Happy Valley allege that it was Maris which fraudulently indorsed the cheques over to the plaintiffs when Maris was not entitled so to do. That is not so. Happy Valley knew very well that the cheques would be indorsed over to the plaintiffs. The allegation that the goods which were delivered were not in accordance with samples/contract is also false. Considering the relationship between Stemark, Maris and Happy Valley, it seems to me that what Happy Valley allege amounts to saying that Stemark was out to cheat Happy Valley, which effectively means that Nicholas Chu was out to cheat himself.

In the result I order that judgment be entered against the defendants in the total sum of $263,900, with interest at 6% from the dates of the respective cheques, and costs.

Claim allowed.

Solicitors: *Drew & Napier; Tang & Co.*

Reported by *Yap Shao Sin*